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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MIKE M. MADANI, et al.,

Plaintiffs, on behalf of themselves and those similarly situated,

v.

SHELL OIL COMPANY; CHEVRON CORPORATION; and SAUDI REFINING, INC.,

Defendants.

Case No. C 07-4296 MJJ

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION FOR TRANSFER OF VENUE

[Continued listing of moving parties and counsel]

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In this action, plaintiffs attempt to litigate under different legal theories a case that was litigated for three years before Judge George H. King in the Central District of California, *Dagher v. Saudi Refining, Inc.* After extensive discovery, Judge King granted summary judgment for defendants in 2002. The Supreme Court unanimously affirmed four years later. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). Defendants argue that this action should be transferred to the Central District in the interests of justice, because Judge King is familiar with the facts and issues in this case and because plaintiffs are forum shopping. For the reasons that follow, the Court agrees and GRANTS defendants' motion.

BACKGROUND

Both this case and *Dagher* were brought by Shell- and Texaco-branded service station dealers against Shell Oil Company, Texaco Inc.,[1] and Saudi Refining, Inc. (Davids Decl., Ex. B.) The plaintiffs in *Dagher* alleged that the defendants used two joint ventures—Motiva Enterprises LLC and Equilon Enterprises LLC—to fix prices of gasoline in violation of Section 1 of the Sherman Act. (*Id.* ¶¶ 73-86.) As here, the plaintiffs in *Dagher* alleged a nationwide class of all Shell- and Texaco-branded dealers who bought gasoline from one or both of the joint ventures. (*Id.* ¶ 1.) As here, the plaintiffs in *Dagher* were represented by Daniel R. Shulman, John H. Boone, Joseph M. Alioto, and Thomas P. Bleau as lead counsel. (*Id.*) Each of the current plaintiffs was a member of the alleged class in *Dagher*.

The difference between *Dagher* and this case is the specific antitrust claim being pursued and the additional proof that claim requires. Here, plaintiffs allege that defendants' conduct violated the Rule of Reason. (Compl. ¶¶ 113, 115.) Under the Rule of Reason, the plaintiffs must prove that the challenged conduct was unreasonable and anticompetitive in the relevant markets. *See Dagher*, 547 U.S. at 5 (distinguishing Rule of Reason and *per se* claims). In the *Dagher* action, by contrast, the plaintiffs explicitly waived reliance on the Rule of Reason, and committed themselves to pursuing only a *per se* claim (and a related "quick look" claim).

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[1] Here, plaintiffs sue Chevron Corporation as Texaco's successor in interest. (Compl. ¶ 18.)

(Davids Decl., Ex. D at 14-16.) They did so despite Judge King's warning that he would not allow duplicative litigation in which counsel first pursues a *per se* claim and then comes back to later pursue a Rule of Reason claim when the first claim proves fruitless. (Davids Decl., Ex. D at 10-16.) Given this express waiver, *Dagher* proceeded at all times solely on the basis of the plaintiffs' claim of *per se* illegality under section 1.

On cross-motions for summary judgment, Judge King granted summary judgment to the defendants, ruling that it was not *per se* illegal for a joint venture to set the selling price of its own gasoline. *Dagher v. Saudi Ref., Inc.*, No. CV 99-6114 GHK, 2002 WL 34099815, *12 (C.D. Cal. Aug. 13, 2002). Judge King also granted summary judgment for Saudi Refining on the ground, among others, that none of the *Dagher* plaintiffs had standing to sue Saudi Refining. *Dagher v. Saudi Ref., Inc.*, No. CV 99-6114 GHK, 2002 WL 34099816, *7 (C.D. Cal. May 21, 2002). Judge King's summary judgment rulings were ultimately affirmed. Although the Ninth Circuit reversed the ruling on *per se* illegality as to Shell and Texaco (*Dagher v. Saudi Ref., Inc.*, 369 F.3d 1108, 1125 (9th Cir. 2004)), a unanimous Supreme Court reversed the Ninth Circuit, holding that, "[a]s a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price." *Dagher*, 547 U.S. at 8.

With the *per se* claim having thus been litigated and lost in *Dagher*, the current plaintiffs filed this action to assert a Rule of Reason claim seeking the identical damages, and to add a new claim under Section 7 of the Clayton Act. (Compl. ¶¶ 115, 117.) Rather than re-filing the action in the Central District, plaintiffs' counsel filed the action her in the Northern District.

LEGAL STANDARD

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). To transfer an action under section 1404, the Court must make two findings: (1) that the transferee district is one in which the action might have been brought, and (2) that a transfer would be convenient and in the interest of justice. *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985).

To meet the "might have been brought" requirement, the transferee court must have personal jurisdiction over the defendants and subject matter jurisdiction over plaintiffs' claims, and venue must be proper. *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960). In determining whether a transfer is appropriate, the relevant factors are (1) the interest of justice, including conservation of judicial resources and discouraging forum shopping, (2) the plaintiff's choice of forum, and (3) the convenience of the parties and witnesses and access to evidence. *Wireless Consumers Alliance v. T-Mobile USA, Inc.*, No. C 03-3711 MHP, 2003 WL 22387598, *4-6 (N.D. Cal. Oct. 14, 2003). In adjudicating the motion, "[t]he district court has broad discretion to consider case-specific circumstances." *Id.* at *1.

ANALYSIS

A. Plaintiffs Might Have Brought This Action in the Central District.

Defendants do not contest that they are subject to personal jurisdiction in California for purposes of this action. The district court has subject matter jurisdiction over plaintiffs' claims pursuant to 15 U.S.C. § 15 and 28 U.S.C. § 1337. Venue is proper in the Central District because defendants are deemed to reside in any district in which they are subject to personal jurisdiction. 28 U.S.C. § 1391(c).

B. A Transfer Would Be in the Interest of Justice and Convenient.

1. *The Interest of Justice.*

"The question of which forum will better serve the interest of justice is of predominant importance on the question of transfer, and the factors involving convenience of parties and witnesses are in fact subordinate." *Wireless Consumers*, 2003 WL 22387598, at * 4. Two important "interests of justice" factors are conservation of judicial resources and avoiding forum shopping. *Id.* at *5-6.

Judicial resources are conserved when an action is adjudicated by a court that has already "committed judicial resources to the contested issues and is familiar with the facts of the case." *Samsung Elec. Co. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 722 (E.D. Va. 2005); *accord Von der Werth v. Johns Manville Corp.*, No. C 07-01456 JSW, 2007 WL 2348707, at *3 (N.D. Cal. Aug. 14, 2007). Judicial familiarity weighs in favor of transfer whether or not a related case is

currently pending in another district. Thus, in *Wireless Consumers*, Judge Patel ordered the case transferred even though the previous case was no longer pending. She found that transfer would "avoid the risk of conflicting rulings" and would "save judicial resources and serve the interest of justice." 2003 WL 22387598, at *5; *see also Hoefer v. U.S. Dep't of Commerce*, No. C 00-0918 VRW, 2000 WL 890862, *3 (N.D. Cal. June 28, 2000) (ordering transfer to the district where an earlier action had been litigated, finding as "perhaps the most compelling factor" that "to allow this case to proceed in the Northern District would entail a significant waste of time and energy and would involve duplicative effort by this court.")

The same is true here. In the event of a transfer, the action would almost certainly be reassigned to Judge King under related case procedures. *See* Central District L.R. 83-1.3.1; Central District General Order 05-06, § 5.2. Because he presided over *Dagher* for more than three years, Judge King is in the best position to determine the validity of plaintiffs' argument that the pendency of *Dagher* tolled the statute of limitation. (*See* Compl. ¶¶ 57-63.) Similarly, should it prove necessary to reach the merits of plaintiffs' antitrust claims, Judge King is already familiar with the formation and operations of Equilon and Motiva. *Dagher*, 2002 WL 34099816, at *5 (noting that plaintiffs filed four volumes of materials totaling 1,054 pages and defendants submitted fourteen volumes of materials with respect to the motion for summary judgment). Judge King is also familiar with the underlying legal issues, and is better situated to address whether his prior ruling, as affirmed by the Supreme Court, effectively disposes of plaintiffs' Rule of Reason claim just as much as it did the *per se* claim in *Dagher*.

A transfer to the Central District is also appropriate to prevent forum shopping. *See, e.g.*, *Gerin v. Aegon USA, Inc.*, No. C 06-5407 SBA, 2007 WL 1033472, at *7 (N.D. Cal. Apr. 4, 2007) (transferring case where plaintiffs "appear to be attempting to re-litigate their failed case in more sympathetic forum"); *Wireless Consumers*, 2003 WL 22387598, at *5 ("evidence of plaintiff's attempt to avoid a particular precedent from a particular judge weighs heavily . . . and would often make the transfer of venue proper.").

As in *Wireless Consumers*, the Central District is the obvious forum in which this action should be litigated. *Dagher* was litigated there for three years by the same lawyers on behalf of

the same alleged class. Judge King is already familiar with the joint ventures. Plaintiffs' complaint here expressly relies upon the pendency of *Dagher* as the basis for arguing that their claim is not barred by the statute of limitations. (Compl. ¶¶ 57-63.) Despite all this, plaintiffs elected to file in the Northern District. This decision can only be viewed as forum shopping—*i.e.*, as an effort avoid having their claim decided by the same court that granted summary judgment to the defendants in *Dagher* and before which plaintiffs' counsel expressly waived the Rule of Reason they now seek to pursue. *See, e.g., Alexander v. Franklin Res., Inc.*, No. C 06-7121 SI, 2007 WL 518859, at *4 (N.D. Cal. Feb. 14, 2007) ("One could reasonably infer forum shopping here, where the same plaintiff represented by the same law firm filed a similar lawsuit in New Jersey, and after receiving unfavorable rulings from that court, filed the instant case.").

2. *Plaintiffs' Choice of Forum Is Not Entitled to Weight Here.*

A plaintiff's choice of venue is entitled to diminished deference when a plaintiff purports to represent a nationwide class. *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987); *Von der Werth*, 2007 WL 2348707, at *3 (granting motion to transfer purported nationwide antitrust class action). Moreover, a plaintiff's choice of forum is accorded little deference if there is any indication the plaintiff is engaging in forum shopping. *See, e.g., Williams v. Bowman*, 157 F. Supp. 2d 1103, 1116 (N.D. Cal. 2001).

Both circumstances are present here. First, plaintiffs have sued on behalf of a purported nationwide class of some 25,000 Shell and Texaco dealers. (Compl. ¶ 1.) Many of these dealers will likely have no connection to the Northern District of California. Indeed, as noted, only three of the named plaintiffs reside in the Northern District, while thirteen reside in the Central District. (*Id.* ¶ 4.) Moreover, as discussed above, plaintiffs' choice of this district is a textbook case of forum shopping.

3. *The Convenience Factors Also Support Transfer.*

(a) Convenience of the Parties

Given that plaintiffs have alleged a class of some 25,000 branded Shell and Texaco dealers across the nation, this factor would at best be considered neutral. *See Wiley v. Trendwest*

Resorts, Inc., No. C 04-4321 SBA, 2005 WL 1910934, at *6 (N.D. Cal. Aug. 10, 2005) ("Since a nationwide class action litigation is at issue here, this factor is presumably neutral.").

Here, however, this factor weighs in favor of transfer. Not only are the alleged class members spread all over the country, but even the named plaintiffs are located predominately in the Central District. Moreover, that plaintiffs' counsel chose the Central District to litigate the *Dagher* action on behalf of the identical class strongly suggests that the Central District is a more convenient forum. *See Gerin*, 2007 WL 1033472, at *6-7.

Likewise, defendants will not be inconvenienced by a transfer to the Central District. Shell Oil Company and Saudi Refining, Inc. are both headquartered in Houston, Texas. (Compl. ¶¶ 11, 26.) It is equally convenient to fly from Houston to Los Angeles as it is to San Francisco. Although the third defendant, Chevron Corporation, is headquartered in the Northern District (*id.* ¶ 18), the allegations in the complaint concern Texaco Inc. before its acquisition by Chevron Corporation in 2001. (*Id.* ¶ 112.) Chevron does not believe there will be any inconvenience to it in litigating in the Northern District.

(b) Convenience of the Witnesses

This factor focuses on the convenience of third-party witnesses other than employees. *E.g.*, *Munoz v. UPS Ground Freight, Inc.*, No. C 07-00970 MJJ, 2007 WL 1795696, at *4 (N.D. Cal. June 20, 2007). Here, this factor is neutral. Were this action to proceed to trial, third-party witnesses would likely fall into two categories: (1) expert witnesses and (2) former officers and employees of Motiva, Equilon, and defendants. Expert witnesses testify for a living and, even for any who may reside in Northern California, traveling to Los Angeles would not present any serious inconvenience. *See AV Media v. OmniMount Systems, Inc.*, No. C 06-3805 JSW, 2006 WL 2850054, at *4 (N.D. Cal. Oct. 5, 2006) (holding that convenience of expert witnesses "'is given little weight' when determining venue") (citation omitted). With regard to former employees of the joint ventures and defendants, they are likely to reside in other states. All but one of the Motiva, Equilon, defendant, and third-party percipient witnesses deposed in the *Dagher* case resided outside of California. (Davids Decl., ¶ 9.)

(c) Access to Evidence

Access to evidence is a neutral factor. While plaintiffs' Rule of Reason claims raise significant new issues regarding the existence of market power and anticompetitive effects that were not present with respect to plaintiffs' *per se* claim in *Dagher*, evidence on such issues is no more likely to be located in the Northern District than in the Central District. Further, to the extent additional discovery is appropriate, "[w]ith technological advances in document storage and retrieval, transporting documents does not generally create a burden." *David v. Alphin*, No. C 06-04763 WHA, 2007 WL 39400, *3 (N.D. Cal. Jan. 4, 2007). For both of these reasons, access to evidence is not a consideration here.

CONCLUSION

For the foregoing reasons, the Court GRANTS defendants' motion to transfer and ORDERS the case transferred to the Central District of California. The Clerk is directed to transfer this case forthwith.

Dated: _____.

_____
MARTIN J. JENKINS
United States District Judge